

MCLE ON THE WEB (\$15 PER CREDIT HOUR)  
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LEGAL ETHICS

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**Ethics and the Internet**

In a chaos dot com world, Internet use presents many practical, ethical and regulatory questions for lawyers

By DAVID M.M. BELL

Last month, I participated in an ABA program entitled Chaos Dot Com — A Symposium on the Regulation of Technology-Based Client Development, sponsored by the ABA Commission on Responsibility in Client Development. The program brought together individuals knowledgeable in technology, marketing and legal ethics, and included representatives from the ABA Ethics 2000 Commission.

As the Chaos Dot Com title suggests, the current situation is uncertain for lawyers practicing or holding out over the internet. Internet use presents numerous practical, ethical and regulatory questions for lawyers, many of which do not have ready answers.

Here in California, there appears to be little official guidance. Recently, the State Bar's Ethics Committee published a draft ethics opinion on internet advertising by lawyers which is very helpful, but is only a start. There are an array of internet issues on which California lawyers could use practical guidance.

Below I identify a number of key internet issues and provide a professional responsibility analysis using California authority. This space does not permit extensive discussion, but I will try to hit the high points.

**Advertising**

In my 1996 California Bar Journal article, Internet Use Raises Ethical Questions, I opined that California Rule of Professional Conduct 1-400 and Business & Professions Code §§6157-6158 apply to lawyer web sites. A recent State Bar draft ethics opinion, Interim Opinion No. 96-0014, reaches the same conclusion.

When a lawyer's web site provides information to the public concerning a lawyer's availability for professional employment, that lawyer is making a "communication" for purposes of CRPC 1-400(A). The communication is regulated under CRPC 1-400 to the same extent as any other communication made by the lawyer in print, audio or visual format. The communication must be truthful and not misleading (CRPC 1-400(D)) and must comply with all CRPC 1-400 Standards (CRPC 1-400(E)).

Lawyer web sites are also regulated under Business & Professions Code §§6157-6158, which apply to "electronic medium . . . computer networks" (Business & Professions Code §6157(d)). These code sections, which prohibit false, deceptive or misleading advertising, contain additional prohibitions and requirements not found in CRPC 1-400.

California lawyers should review both authorities when developing and maintaining a web site. They should investigate whether any special advertising requirements apply to their particular practice area. In addition to disciplinary action, lawyers can be exposed to civil damages for deceptive advertising pursuant to Bus. & Prof. Code §§17200 and 17500.

A current requirement in CRPC 1-400(F) appears problematic. This mandates a lawyer to “retain for two years a true and correct copy or recording of any communication made by written or electronic media.” In Interim Opinion No. 96-0014, the Ethics Committee concludes that this requirement applies “to each and every page of every version and revision of the web site.” However, at the Chaos Dot Com program, there appeared to be unanimous agreement among the technology experts and large web site operators present that the two-year rule was not feasible when applied to web sites.

Another advertising issue is the “metatag,” the hidden message that exists at the top of an HTML page that is used to attract internet search engines (and potential viewers) to the web site. Even though a metatag is not “seen” by the public, does a lawyer violate California advertising standards if that lawyer’s metatag is misleading? Interim Opinion No. 96-0014 does not address this issue, but I believe where a metatag is intended and used to attract potential clients by untruthful or misleading means, a CRPC 1-400 violation occurs.

Multijurisdictional advertising issues also exist. A California lawyer, through his or her web site, can be subject to the jurisdiction and regulation of other states. Those states can have lawyer advertising standards that are more restrictive than California. A California lawyer’s web site presence or activity in another state may also violate that state’s unauthorized practice of law statutes. These outside standards, like California’s, do not remain static but continue to evolve, which creates additional uncertainties for California lawyers. These issues are discussed below in Multijurisdictional Practice, and Unauthorized Practice of Law.

Additional advertising issues may be anticipated in the future. For example, Interim Opinion No. 96-0014 concludes that a web site is not a “solicitation” for purposes of CRPC 1-400(B), but the web site addressed in that opinion is relatively primitive (it does not include live video interactivity, a bulletin board, links to other law-related web sites, or news-group functions). As technology evolves, and live video interactivity develops into holographic virtual presence, the solicitation issue will heighten.

#### **Attorney-client relationship**

The key issue here is inadvertent formation of attorney-client relationships. The issue presents itself in “real time” chat rooms and threaded conversations where lawyers may discuss legal problems with other participants. The issue also manifests in attorney-client “match” companies, which attempt to match potential clients with participating attorneys.

When providing a response to a legal question posed by another chat room participant, a lawyer may inadvertently create an attorney-client relationship with that participant. The non-lawyer may believe that the lawyer has provided legal advice and formed an attorney-client relationship with the non-lawyer. The non-lawyer bears the burden to prove the existence of the attorney-client relationship, but can make a prima facie case by showing that confidences were given to, or advice was received from, the lawyer. (See *U.S. v. Rowe* (9th Cir. 1996) 96 F.3d 1294; *People v. Thoi* (1989) 213 Cal.App.3d 689, *Miller v. Metzinger* (1979) 91 Cal.App.3d 31; *Ferrari v. LaSalla* (1960) 186 Cal.App.2d 263.)

Inadvertent attorney-client formation issues can also arise for lawyers who gain clients through attorney-client “match” companies. Here, much depends on how the company operates its service. I advise participating lawyers that they should never provide a specific response to any legal question posed by a prospective “matched” client, until a formal attorney-client relationship has been formed.

### **Competence**

At present, I am not aware of any California rule, statute or case that mandates computer/internet mastery by lawyers. However, I can envision situations where technological competence could come into play. For example, if a lawyer recklessly or repeatedly loses a client’s internet files, or transmits those files to the wrong recipient, because the lawyer does not know how to use the technology, I could see an argument for violation of CRPC 3-110(A).

Technical competence issues will heighten as computers and the internet become more interwoven into legal practice. Soon, the ability to conduct competent legal research and to communicate effectively with clients and the courts may become dependent on possessing adequate computer/internet skills.

### **Communications**

Here, the ethical issue discussed most often regards maintaining confidentiality of communications, which I address below under Confidences and Secrets.

Another less-considered issue is that lawyers’ internet messages are often dashed off quickly and written poorly. Lawyers should be aware that internet messages, like other written communications, can be held up for consideration many years later.

### **Confidences and secrets**

I am not aware of any California rule, statute or case that requires lawyers to encrypt or take other specific precautions to insure the confidentiality of internet communications. Recent ABA Ethics Opinion No. 99-413 concludes that lawyers generally may transmit confidential information by unencrypted e-mail without specific client consent, but should consult with clients and follow their instructions on the method of transmitting highly sensitive information.

In California, a lawyer has a duty under Business & Professions Code §6068(e) to “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” A lawyer must protect confidential client information regardless of the communication medium used to transmit the information. As the ABA opinion suggests, lawyers should consider the sensitive nature of a client’s confidential information, and where appropriate consult with clients to determine a preferred transmission mode.

### **Conflicts of interest**

Conflict of interest issues can arise or become exacerbated for lawyers as result of their chat room use, affiliation with on-line legal service providers, or provision of ancillary services over the internet. When forming attorney-client relationships and providing professional services to clients, over the internet or otherwise, California lawyers are required to follow the California rules, including CRPC 3-300 and CRPC 3-310 regarding conflicts of interest. Lawyers should consider how these rules are implicated when communicating on-line or when considering affiliation with an on-line legal service provider.

### **Fees and costs**

Computers and the internet are affecting the way lawyers value and bill their services. Many legal services, from research to drafting to document production, can be accomplished more efficiently with computers. One result is the onset of value billing, which does not reflect actual time spent by the lawyer, but rather the value of the legal service provided to the client.

Regardless of billing method, CRPC 4-200 prohibits a lawyer from entering into an agreement for, charging or collecting an unconscionable fee. Lawyers should consider whether their fees are appropriate under the 11 conscionability factors set forth in CRPC 4-200(B). The point here is that advancing technology can and will affect the difficulty, cost and value of particular legal services.

### **Files**

Many lawyers enjoy a false sense of security regarding the permanence of information stored in their computers. This is a mistake. Although I am aware of no California authority that so mandates, I recommend that lawyers backup their computers, to protect against catastrophic loss of client information in the event of a computer crash.

### **Forms of practice**

The internet has spawned many web sites providing a wide variety of legal information and legal services on the internet. Some of these web sites are owned and operated by lawyers, others by non-lawyers.

Lawyers who affiliate with a web site that provides legal information or legal services over the internet should review the web site's operations to insure that the site, in its advertising or operation, does not cause the lawyer to run afoul of any professional responsibility standards. A lawyer should carefully examine any non-lawyer-owned or -operated web site that provides legal services to insure that the lawyer will not aid or abet the unauthorized practice of law (CRPC 1-300), improperly share legal fees with a non-lawyer (CRPC 1-320) or lose professional independence of judgment (CRPC 1-600). The lawyer should insure that affiliation will not cause the lawyer to violate advertising rules (CRPC 1-400, Business & Professions Code §§6157, 6158), conflict of interest rules (CRPC 3-300 and 3-310) or client confidentiality standards (Business & Professions Code §6068(e)).

### **Multidisciplinary practice**

The internet has created interest in "one stop shops" that provide both legal and non-legal services to consumers. Recently, the ABA Multidisciplinary Practice Commission recommended that lawyers be permitted to form multidisciplinary practices, or "MDPs," to provide mixed legal and non-legal services to consumers. In such MDPs, lawyers would be permitted to enter into partnership and share legal fees with non-lawyers.

In California, a lawyer must adhere to the professional standards of an attorney in providing mixed professional services to consumers. (See *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 429; *Libarian v. State Bar* (1945) 21 Cal.2d 862,865.) To obtain a more complete analysis of duties relating to the provision of ancillary services, lawyers should review State Bar Ethics Opinion Nos. 1995-141 and 1999-154. At present, California lawyers may not form law partnerships or share legal fees with non-lawyers. (See CRPC 1-310 and 1-320.)

### **Multijurisdictional practice**

A California lawyer, through his or her web site, can be subject to the jurisdiction and regulation of another state. This can raise conflict of law issues for the lawyer regarding the lawyer's professional responsibilities.

Under CRPC 1-100(D)(1), a California lawyer must follow the California rules while practicing in a another state, except to the extent that that state's rules specifically require the lawyer to follow rules of professional conduct different from the California rules. In practice, this means that the California lawyer must follow the stricter rule, whether it be California's or the foreign state's, when practicing in the foreign state.

Complicating matters, the determination of whether a lawyer is “practicing” in a foreign state depends on that state’s particular laws. As a result, lawyers often place disclaimers on their web sites noticing viewers that the web site is not intended to solicit clients and/or the lawyer will not accept clients from specified states. By this approach, lawyers attempt to avoid subjecting themselves to the jurisdiction, regulation and enforcement of particular foreign states. At this point, it is not clear how effective such disclaimers are in avoiding exposure.

The internet is creating ever-greater pressure on the states and courts to drop state-based jurisdictional boundaries and to develop uniform ethical standards. How this issue plays out is anyone’s guess, but it is clearly a major issue facing legal policymakers today.

### **Unauthorized practice of law**

This issue is addressed under Advertising, Forms of Practice, and Multijurisdictional Practice above. One important additional point — lawyers should make sure that their web sites clearly identify states where they are licensed to practice law, as well as their practice limitations, to help avoid exposure to allegations of unauthorized practice of law.

### **Conclusion**

It is clear that lawyers need multidimensional knowledge to create and operate their web sites effectively and ethically. Before starting a web site, lawyers should consider carefully the California rules and the rules of other states in which their web site appears. Following such investigation, lawyers should consider providing disclaimers regarding solicitation, licensure and provision of legal services where appropriate. Following start-up, lawyers should continue to make sure that their web site information is accurate and current, and that their web site comports with evolving standards.

The internet offers many opportunities for lawyers and the legal profession, but it also presents many challenges. How the profession responds to those challenges will define how law is practiced in the future.

*David M.M. Bell, now in private practice, formerly was State Bar director of professional competence, overseeing rule development and the Ethics Hotline. He can be reached at [dmbell@dnai.com](mailto:dmbell@dnai.com).*

## **Test — Legal Ethics**

### **1 Hour MCLE Credit**

This test will earn 1 hour of MCLE credit in Legal Ethics.

1. True/False. When a California lawyer's web site provides information to the public concerning a lawyer's availability for professional employment, that lawyer is making a "communication" for purposes of CRPC 1-400(A).
2. True/False. A California lawyer's internet "communication" is regulated under CRPC 1-400 less rigorously than communications made by the lawyer in print, audio or visual format.
3. True/False. A web site "communication" made by a California lawyer must be truthful and not misleading, but need not comply with all CRPC 1-400 Standards.
4. True/False. California lawyers' web sites are regulated under Bus. & Prof. Code §§6157-6158.
5. True/False. Business & Professions Code §§6157-6158 contain identical advertising standards to those found in CRPC 1-400.
6. True/False. A California lawyer must retain for three years a true and correct copy or recording of any communication made by written or electronic media.
7. True/False. California lawyers can be exposed to civil damages for deceptive advertising.
8. True/False. A non-lawyer bears the burden to prove the existence of an attorney-client relationship, but can make a prima facie case by showing that confidences were given to, or advice was received from, the lawyer.
9. True/False. CRPC 3-110 (Failing to Act Competently) expressly requires a California lawyer to possess computer skills.
10. True/False. A lawyer need not be as careful in drafting e-mail messages as with other written communications, because e-mails are discarded by recipients shortly after receipt.
11. True/False. There is no CRPC that expressly requires California lawyers to encrypt their e-mail communications.
12. True/False. A California lawyer has a duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."
13. True/False. A California a lawyer is prohibited from entering into an agreement for, charging or collecting an unconscionable fee for legal services.

14. True/False. A lawyer's "value billing" of a client is generally based upon the time spent on the client's matter by the lawyer.
15. True/False. There are eight conscionabilty factors set forth in the California Rules of Professional Conduct.
16. True/False. A California lawyer is prohibited from aiding or abetting the unauthorized practice of law
17. True/False. A California lawyer need not conform to the professional standards of an attorney with regard to non-legal professional services that the lawyer provides to a client in conjunction with legal services.
18. True/False. California lawyers may not form law partnerships with non-lawyers.
19. True/False. California lawyers are expressly permitted to share legal fees with non-lawyers in a multidisciplinary practice.
20. True/False. A California lawyer must always adhere to the California rules when practicing in another state.

## **Certification**

- This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour, of which 1 hour will apply to Legal Ethics.
- The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.



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### TEST #16 – Ethics and the Internet

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